Supreme Court, U.S.
FILED
APR 12 2000
CLERK

Nos. 99-1257, 99-1263, 99-1265,
99-1426, 99-1431, 99-1442

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for American Lung Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

TABLE OF CONTENTS

Page

CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 1

ARGUMENT 2

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE 4

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors 4

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Nondelegation Issue 9

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI 11

TABLE OF CONTENTS – Continued

Page

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS 14

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE 24

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 12

American Petroleum Institute v. Costle, 665 F.2d 1176 (D.C. Cir. 1981) 12

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 8

American Textile Manufacturers Inst. v. Donovan, 452 U.S. 490 (1981) 6, 7

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 1, 12

Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 16

FDA v. Brown & Williamson Tobacco Corp., U.S. Supreme Court No. 98-1152 (March 21, 2000) .. 12, 13

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 6

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 10

Jones v. United States, 119 S. Ct. 2090 (1999) 26

Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 11

Lichter v. United States, 334 U.S. 742 (1948) 6

Mistretta v. United States, 488 U.S. 361 (1989) 5, 6, 7

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 6

TABLE OF AUTHORITIES – Continued

Page

Natl. Cable Television v. United States, 415 U.S. 336 (1974) 10, 11

Natural Resources Defense Council v. Administrator, 902 F.2d 962 (D.C. Cir. 1990) 12

Natural Resources Defense Council v. USEPA, 824 F.2d 1146 (D.C. Cir. 1987) 12

Union Electric Co. v. USEPA, 427 U.S. 246 (1976) 12, 16, 20

Yakus v. United States, 321 U.S. 414 (1944) 6

STATUTES

1967 Clean Air Act § 107, 1967 U.S. Code Cong. & Ad. News 522 17

1967 Clean Air Act § 108, 1967 U.S. Code Cong. & Ad. News 523 ..... 17, 18

1970 Clean Air Act § 110, 1970 U.S. Code Cong. & Ad. News 1959 15

1970 Clean Air Act § 111, 1970 U.S. Code Cong. & Ad. News 1963 15

1970 Clean Air Act § 113, 1970 U.S. Code Cong. & Ad. News 1966 20

1970 Clean Air Act § 231, 1970 U.S. Code Cong. & Ad. News 1989 16

1970 Clean Air Act § 312, *reprinted in* 1977 Legislative History at 7431 15

Clean Air Act § 108, 42 U.S.C. § 7408 ..... *passim*

Clean Air Act § 109, 42 U.S.C. § 7409 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Clean Air Act § 112, 42 U.S.C. § 7412 23

Clean Air Act § 317, 42 U.S.C. § 7617 23

Pub. L. 95-95, § 129, 91 Stat. 746-47 (August 7, 1977) 22

Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) 22

LEGISLATIVE HISTORY

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972) 21

S. Rep. 1196, 91st Cong., 2d Sess. (1970) 19

H.R. Rep. 294, 95th Cong., 1st Sess. (1977) 22

116 Cong. Rec. 19224 (June 10, 1970) 20

116 Cong. Rec. 32901 (September 21, 1970) 20

FEDERAL REGISTER

36 Fed. Reg. 8186 (April 30, 1971) 11

62 Fed. Reg. 38652 (July 18, 1997) 1, 11

62 Fed. Reg. 38856 (July 18, 1997) 1, 25

COURT RULES

Sup. Ct. R. 14.1 24

CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

---

[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Nondelegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*," *id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) (*"Vinyl Chloride"*); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

---

[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

---

[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for American Lung Association

[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.